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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RODERICK MAGADIA, individually and on behalf of all those similarly situated,

Plaintiff,

v.

WAL-MART ASSOCIATES, INC., a Delaware corporation; WAL-MART STORES, INC., a Delaware corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No.: 5:17-cv-00062-LHK

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF WALMART'S POST-TRIAL BRIEF

Pursuant to Federal Rule of Evidence 201(b) and (d), Defendants WAL-MART ASSOCIATES, INC. and WAL-MART STORES, INC. (collectively "Walmart") respectfully request that the Court take judicial notice of the California Labor Commissioner's Memorandum of Points And Authorities re New Trial (attached hereto as Exhibit A) and the California Labor Commissioner's Memorandum Of Points And Authorities In Opposition To Petition For Writ of Mandate (attached hereto as Exhibit B) in the action entitled *Bodega Latina Corporation v. Labor Commissioner Of The State of California*, filed in the Los Angeles Superior Court, Case No.: BS162695.

Records filed in another court are judicially noticeable because they are matters of public record capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *Id.* 201(b); *Shaw v. Hahn*, 56 F.3d 1128 (9th Cir. 1995).

Dated: November 7, 2018

DUANE MORRIS LLP

By:/s/Aaron T. Winn
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EXHIBIT A

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STATE OF CALIFORNIA
Division of Labor Standards Enforcement
Department of Industrial Relations
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FILED
Superior Court of California
County of Los Angeles
JAN 03 2018
Sherri R. Carter, Executive Officer/Clerk
By: _____, Deputy
CARMEN DEL RIO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

BODEGA LATINA CORPORATION, Petitioner, vs. LABOR COMMISSIONER OF THE STATE OF CALIFORNIA, DEPARTMENT OF INDUSTRIAL REPLATIONS, DIVISION OF LABOR STANDARDS ENFORCMENT, Respondent.	CASE NO. BS162695 RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITIONER'S MOTION FOR NEW TRIAL Hearing Date: January 17, 2018 Time: 9:30 a.m. Department : 86 Judge: Honorable Amy Hogue

I. UNDERLYING SUBSTANTANTIVE AND PROCEDURAL FACTS

On August 29, 2015, the Division of Labor Standards Enforcement ("DLSE") issued a wage and penalty assessment citation to petitioner, Bodega Latina Corporation, for violations of various Labor Code provisions. Petitioner timely appealed the citation and an administrative hearing was held over the course of several days, concluding on February 3, 2016. On April 8, 2016, the hearing officer issued the Notice of Findings on the citations, after which petitioner filed a petition for administrative mandate, pursuant to Code of Civil Procedure §1094.5, challenging the hearing officer's findings. After lengthy and substantial briefing by petitioner and respondent, this court held a *trial* on the petition for writ of mandate on September 27, 2017. This court reviewed the administrative decision pursuant to its statutory authority set forth in Code of Civil Procedure §1094.5.

The writ hearing or *trial* was *not* the type of fact-finding that takes place at a usual civil trial. Nevertheless, petitioner sought to submit additional evidence not contained within the administrative record. (See Declaration of Laura Reathaford in Support of Its Notice of Motion and Motion for Writ of Administrative Mandate filed on September 6, 2017 and Reporter's Transcript of Proceedings attached as Exhibit B to Declaration of Laura Reathaford in Support of Petitioner's Motion for New Trial[1]). This court properly excluded petitioner's proffered evidence at the writ trial because petitioner failed to meet the test for the admission of new evidence as required by Code of Civil Procedure §1094.5(e).

The evidentiary limitation imposed on the court by section 1094.5(e), relating to the trial court's authority to admit and consider new evidence, is a central issue to petitioner's motion for a new trial. Petitioner's own failure to submit certain evidence in the underlying administrative hearing and failure to meet the test for admission of new evidence did not prevent petitioner from having a fair trial and does not justify a new trial. As such, petitioner's motion should be denied.

[1] Hereinafter referred to as "Reathaford Decl."

II. ARGUMENT

Petitioner urges this court to grant it a new trial so that evidence, which was available to petitioner and could have been produced by petitioner at the administrative hearing, be considered by this court. Despite petitioner's characterization of events, this court's refusal to consider evidence outside the administrative record, and for which no motion to augment the record was filed, did not create a condition upon which a new trial should be granted. Moreover, even if the evidence which petitioner seeks to have the court consider had been admitted at the underlying hearing, such evidence does not preclude DLSE's enforcement activities in this case.

A. MOTION FOR NEW TRIAL

"The authority of a trial court to grant a new trial is established and circumscribed by statute. 'Section 657 sets out seven grounds for such a motion: (1) "[i]rregularity in the proceedings'; (2) "[m]isconduct of the jury"; (3) "[a]ccident or surprise"; (4) "[n]ewly discovered evidence"; (5) "[e]xcessive or inadequate damages"; (6) '[i]nsufficiency of the evidence"; and (7) "[e]rror in law."' [Citation.]" *Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1227.

Petitioner argues that a new writ trial is warranted on several grounds established by Code of Civil Procedure §657. Specifically, petitioner contends that there was irregularity in proceedings of the court; that petitioner's counsel was subject to accident or surprised which she could not have guarded against; that there was insufficient evidence to support the judgment; that there was error in law; and that the judgment is excessive. Central to all the arguments asserted by petitioner is the underlying fact that petitioner did not submit certain evidence at the administrative hearing and now wants this court to reconsider its decision in light of that evidence. (See Reathaford Decl., ¶10).

"Our Supreme Court definitively construed the statutes providing for new trials in *Carney v. Simmonds* (1957) 49 Cal.2d 84 [315 P.2d 305]. There the court said, "[t]he statutes on new trial provide that: 'A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee.' (Code Civ. Proc., § 656.)" *Pollak v. State Personnel Board* (2001) 88 Cal. App. 4th 1394, 1405. Thus, the motion for new trial is essentially asking the

court to re-examine its decision not to accept the evidence of the *Rivera* complaint or PAGA letters and then reevaluate the court's decision based on that additional evidence. As indicated below, the courts rejection of the evidence proffered by petitioner at the writ hearing was proper and did not constitute an irregularity, accident or surprise, insufficiency in evidence, error in law or cause excessive damages to be awarded.

B. PETITIONER FAILED TO SUBMIT AVAILABLE EVIDENCE AT THE ADMINISTRATIVE HEARING AND THIS COURT'S REFUSAL TO CONSIDER SUCH EVIDENCE DOES NOT CONSTITUTE AN IRREGULARITY

"An 'irregularity in the proceedings' is a catchall phrase referring to any act that (1) violates the right of a party to a fair trial and (2) which a party 'cannot fully present by exceptions taken during the progress of the trial, and which must therefore appear by affidavits.' [Citation.]" *Montoya v. Barragan, supra,* 220 Cal.App.4th at pp. 1229-30.

Petitioner argues that there was irregularity in the trial court proceedings because the court should have considered the *Rivera* complaint and PAGA letters in its determination. Petitioner also argues that the court's refusal to allow petitioner to admit the *Rivera* complaint and PAGA letters at the writ trial was erroneous and grounds for a new trial. What petitioner fails to acknowledge is that the proceedings before this court is a mandamus action, which is the exclusive remedy for judicial review of adjudicatory administrative actions of state level agencies. This court's refusal to review evidence not supplied in the administrative record was not an irregularity in the proceeding which deprived petitioner of a fair hearing. To the contrary, petitioner's attempt to introduce new evidence at the writ hearing itself was irregular.

Code of Civil Procedure section 1094(e) expressly limits judicial review to the evidence in the administrative record unless one of two limited exceptions applies: (1) the evidence could not *with due diligence have been produced during the administrative proceedings* or (2) the evidence was improperly excluded by the administrative hearing officer. *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559, 578 (Emphasis added).

Code of Civil Procedure § 1094.5(e) provides:

> Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in

subdivision (f) remanding the case to be reconsidered in light of that evidence.

This section has been construed as a limitation on the court's authority to admit new evidence in a writ proceeding. The general rule is that a hearing on a writ of administrative mandamus is conducted solely on the record of the proceeding before the administrative agency. *Beverly Hills Fed. S. & L. Ass'n. v. Superior Court* (1968) 259 Cal.App.2d 306, 324. As the court stated in *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 595. "It is not contemplated by the code provision that there should be a trial de novo before the court reviewing the administrative agency's action, even under the independent review test. [Citations.] Public policy requires a litigant to produce all existing evidence on his behalf at the administrative hearing." (Citations and internal quotations omitted.)

Moreover, the court in *Windigo Mills* went on to state:

> When the Legislature granted the superior court the discretion to receive 'relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the administrative hearing,' it reasonably may be inferred that it meant to authorize the receipt of evidence of events which took place after the administrative hearing.
>
> *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586 at 596.

The evidence sought to be introduced by petitioner is not evidence of events that took place after the administrative hearing, but is evidence that could have been presented at the hearing and was properly excluded by the trial court.

The administrative record discloses that petitioner was permitted to present its defenses, both legal and factual, at the underlying administrative hearing. Petitioner has failed to establish that the evidence, it now wishes the court to consider, was improperly excluded or not available at the time of the underlying hearing and as such, the evidence was properly excluded by this court.

Moreover, even if the court had the evidence which petitioner seeks to introduce, the judge's comments at the writ hearing do not establish that her decision would have been different or establish an "irregularity" such that a new trial is warranted. Specifically, when asked if the decision not to apply res judicata was based on the fact that there was no evidence in the underlying record of the PAGA claims, the court indicated "It's more than that." (page 3, line 10; See also page 22, line 26 through page 23; line 6). As discussed in Section D below, public

policy dictates that res judicata not apply under the facts of this case.

C. THERE WAS NO ACCIDENT OR SURPRISE TO PETITIONER BY THE COURT IN REFUSING TO CONSIDER EVIDENCE THAT PETITIONER FAILED TO PRESENT AT THE UNDERLYING ADMINISTRATIVE HEARING

Petitioner's argument of accident or surprise is substantively identical to its argument regarding an irregularity in the proceedings relating to this court's refusal to admit and consider the *Rivera* complaint and PAGA letters. As noted by petitioner, accident or surprise as grounds for a new trial denotes some condition or a situation in which a party to an action is unexpectedly placed to his detriment. *Wade v. De Bernardi* (1970) 4 Cal. App. 3d 967, 971. "The condition or situation must have been such that ordinary prudence on the part of the person claiming surprise could not have guarded against and prevented it. Such party must not have been negligent in the circumstances." *Id.*

Petitioner contends it could not have anticipated that the court would misread the *Rivera* complaint and therefore did not bring a copy of the complaint to the writ hearing to admit as evidence. Petitioner contends that this somehow constitutes and "accident" or "surprise" by which petitioner could not have guarded against. However, as articulated above, the court could not consider and did not consider the *Rivera* complaint or the PAGA letters in its decision because the Court was not permitted to do so. (See C.C.P. §1094.5(e) and cases cited in Argument, section B above.) As such, petitioner cannot have been prejudiced when it was unable to present evidence at the writ hearing that it had no right to submit in the first place.

D. THERE WAS SUBSTANTIAL EVIDENCE AFFIRMING THE CITATION AND NO ERRORS IN LAW IN THE COURT'S DECISION ON THE WRIT

Petitioner asserts that there is insufficient evidence and error in law justifying a new trial. It appears that the basis of petitioner's contention is that there was sufficient evidence in the administrative record for the court to conclude that the DLSE's enforcement activity was preempted and the court's failure to conclude that the DLSE was barred constitutes a legal error.

Insufficiency of evidence "means an absence of evidence or that the evidence received, in the individual judgment of the trial judge, is lacking in probative force to establish the proposition of fact to which it is addressed." *Dominguez v. Pantalone* (1989) 212 Cal. App. 3d 201, 215. A

motion for new trial on the grounds that the judgment was error in law requires the moving party to show that the evidence is without conflict and insufficient *as a matter of law* to support the judgment. *McCown v. Spencer* (1970) 8 Cal.App.3d 216, 229.

As petitioner points out, there was some indication in the evidence at the administrative hearing that the class action settlement included PAGA claims. (AR-000998-001037). However, as the court pointed out, the evidence in the administrative record did not specify whether the PAGA claims referenced in the settlement agreement covered the same claims and time frame for which the DLSE issued the citation. (See (Tentative) Order Granting in Part the Petition for a Writ of Mandate attached as part of Exhibit C to Reathaford Decl. at page 8). However, even if the evidence had been included and considered, it was not an "error in law" to refuse to apply *res judicata.* This court properly reviewed the administrative record and found that even in light of the class action and settlement, public policy precluded the application of res judicata to the DLSE's enforcement activities. (See (Tentative) Order Granting in Part the Petition for a Writ of Mandate attached as part of Exhibit C to Reathaford Decl. at pages 7-9). This determination would not necessarily change or be an error in law even had the *Rivera* complaint and PAGA letters been admitted into evidence. (See Exhibit B to Reathaford Decl. at page 21, line 25 to page 22, line 6 and (Tentative) Order Granting in Part the Petition for a Writ of Mandate attached as part of Exhibit C, pages 7-9).

First, the DLSE issued citations which included a wage assessment and a penalty assessment. PAGA claims can only include, by statute, penalties. (See Labor Code §2699; *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348, 380, 381 [PAGA claims are for civil penalties].) As thoroughly briefed in respondent's opposition to the petition for writ of mandate, the settlement agreement in *Cardoza v. Bodega Latina* class action does not preclude the DLSE from carrying out its enforcement duties. Moreover, even if the DLSE was precluded from pursuing the PAGA claims, that preclusion would only affect the penalties assessed by the DLSE, and wold not impact any wages assessed.

As the California Supreme Court expressed in *Iskanian, supra,* 59 Cal,.4th 348, 388, the police powers of the state are not to be superseded without a clear and manifest intent. Although

the PAGA statute allows a private individual to step into the shoes of an enforcement agency, it does not permit the individual to do so indefinitely.

Before pursuing a PAGA claim for penalties, an individual is required to provide notice "of the specific provisions of this code alleged ***to have been*** violated..." Labor Code §2699.3(a)(1)(A) (Emphasis added). If the agency does not intend to investigate the alleged violations that **have occurred**, the aggrieved employee may then commence a civil action to recover penalties. Labor Code §2699.3. The PAGA notice in this case was required to be sent prior to filing the lawsuit for violations occurring prior to 2009. The *Cardoza* lawsuit reached preliminary settlement in May 2011. (AR-001003 §2.8). The class period covers July 25, 2005 through December 2012. The final settlement agreement was signed in 2013 and approved in 2015, **four years** after which initial settlement was reached. Clearly, the Private Attorneys General Act did not contemplate that a notice sent in 2009 and a decision made **at that time** not to investigate **past** violations, would precluding the DLSE from investigating claims and issuing citations for violations that occurring years later. Such a construction would be unjust, would undermine the purposes for which the DLSE exists and would violate the public policy of this state to determine and assess employers for violations of the Labor Code.

Second, it was not an error in law for the court to determine that the *Cardoza* settlement did not foreclose the DLSE's enforcement activities on principles of res judicata. The doctrine of res judicata is applicable if three threshold requirements are satisfied: 1) the decision in the prior proceeding is final and on the merits; 2) the parties must be the same as, or in privity with the party to the former proceeding; and 3) the present proceeding is on the same cause of action as the prior proceeding. *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2004) 126 Cal.App.4th 1180. . However, where the subsequent action involves parallel facts, but a different historical transaction, the application of the law to the facts is not subject to res judicata or collateral estoppel. *Chern v Bank of America* (1976) 15 Cal.3d 866, 871. In addition, the determination whether a party is in privity with another is a policy decision which depends on the circumstances of the case and the relationship between the parties. *Gikas v. Zolin* (1993) 6 Cal.4th 841, 849; *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association*

(1998) 60 Cal.App.4th 1053, 1070.

Numerous court cases confirm that public policy can preclude the application of res judicata. Res judicata will not apply if injustice would result; or if the public interest requires that relitigation not be foreclosed; or in cases which concern matters of important public interest; or in cases involving a public agency's ongoing obligation to administer statutes enacted for the public benefit, and affecting members of the public not before the court. (See *California v. Optometric Association v Lackner* (1976) 60 Cal.App.3d 500, 505; *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 181; *Louis Stores, Inc. v. Dept. of Alcoholic Beverage Control* (1962) 57 Cal.2d 749; and *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562, 592) Because it is within the court's purview to determine that public policy would preclude the application of res judicata, it was not an "error in law" for this court to do just that.

E. THERE ARE NO EXCESSIVE DAMAGES TO JUSTIFYING A NEW TRIAL

Petitioner argues that a new trial should be granted because the judgment is excessive. Code of Civil Procedure §657 authorizes "excessive damages" as grounds for a new trial. The statutory test for granting a new trial on this ground is: "A new trial shall not be granted upon the ground ... of excessive ..., unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the *court or jury* clearly should have reached a different verdict or decision. Cal. Civ. Proc. Code § 657 (Emphasis Added)

In administrative writs however, the standard of review prohibits the reviewing court from substituting its own judgment. In cases in which the administrative proceeding does not affect a fundamental vested right, the trial court reviews the administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law. *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144. In such a case "[a] court may reverse an administrative order only if the hearing officer's factual determinations are not supported by the weight of the evidence." *Vison v. Snyder* (1999) 75 Cal.App.4th 182; *Santos v. Dept. of Motor Vehicles* (1992) 5 Cal.App.4th 537, 545. The trial court may not disregard or overturn the Commission's finding "for the reason that it is considered that a contrary finding would have been equally or more reasonable." *Boreta Enterprises, Inc. v. Department of*

Alcoholic Beverage Control (1970) 2 Cal.3d 85, 94; *Bowman v. Alcoholic Bev. App. Board* (1959) 171 Cal.App.2d 467, 471-472. In this case, a "motion for new trial" to have this Court review the assessment issued by the DLSE is not appropriate and contrary to the procedures for review administrative mandamus.

However, to the extent that the DLSE citation assessment includes amounts for which petitioner contends were settled as part of the *Cardoza/Rivera* action, it is the DLSE contention that the assessment does not result in a "double recovery."

As discussed in Section D above, the *Cardoza* lawsuit was filed in 2009 to recover wages and penalties for violations going back to 2005. The parties reached a tentative settlement in 2011 for class members working July 2005 through December 2012. Logically the settlement would not and could not include wages and penalties that occurred after May 2011 and certainly not after December 2012. The citations at issue in the underlying administrative action assess wages from June 2012 through June 2015 and penalties from June 2014 through June 2015. (AR-000001) The violations giving rise to this wage and penalty assessment occurred years after the filing of the *Cardoza/Rivera* action was filed and could not have been included in any decision made in 2009 by the LWDA not to investigate. Quite simply, if the LWDA declines to investigate a matter at the time the PAGA letter is submitted, it does not preclude the LWDA from investigating subsequent violations, especially those which occur years later. The judgment does not constitute a double recovery because the amounts assessed are for violations occurring after the *Cardoza/Rivera* action was filed and settled.

III. CONCLUSION

A writ of administrative mandamus is not a procedure by which a petitioner can retry its underlying administrative case, which is essentially what petitioner is attempting to do with this motion. What is evident is that the court followed statutory procedure with respect to judicial review of an administrative proceeding. The provisions for review of an administrative decision are clear and section 1094.5(e) operates as a limitation upon the court's authority to admit and consider new evidence. Petitioner's motion simply repeats the request, with new labels and characterizations, that the court accept and consider evidence which was not presented at the

01/23/2018

administrative hearing. This court was briefed on the relevant case law concerning res judicata and class action preemption, received over 1800 pages of evidence, and decided the issues presented by petitioner based on the administrative record and arguments presented at trial. Petitioner's failure to present in the underlying administrative hearing all evidence it wanted considered is not sufficient grounds for granting a new trial. Petitioner was granted a fair trial at the administrative hearing and during the judicial review of the administrative hearing. The procedures for review of administrative mandate were properly followed and the court's decision is supported by both the administrative record and case law. As such, respondent respectfully requests that the motion for new trial be denied in its entirety.

Dated: January 3, 2018

Respectfully submitted,

Deborah D. Graves, Esq.
Attorney for Respondent
Department of Industrial Relations

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. 1013A) OR CERTIFIED MAIL

I, JUDITH A. ROJAS, do hereby certify that I am a resident of or employed in the County of San Diego, over 18 years of age, not a party to the within action, and that I am employed at and my business address is: 7575 Metropolitan Drive, Suite 210, San Diego, CA 92108-4424

On January 3, 2018, I served the within **RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITIONER'S MOTION FOR NEW TRIAL** by placing a true copy thereof in an envelope addressed as follows:

Laura Reathaford, Esq.
Blank Rome LLP
2920 Century Park East, 6th Floor
Los Angeles, CA 90067-3125

and then sealing the envelope and with postage and certified mail fees (if applicable) thereon fully prepaid, depositing it for pickup in this city by:

XX **Federal Express Overnight Mail**

_____ Ordinary First Class Mail

I certify under penalty of perjury that the foregoing is true and correct.

Executed on January 3, 2018, at San Diego, California.

JUDITH A. ROJAS

Case No. BS162695

01/23/2018

PROOF OF SERVICE

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MC-005

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Division of Labor Standards Enforcement By: Deborah D. Graves, Attorney, SBN: 167922 7575 Metropolitan Drive, Suite 210 San Diego, CA 92108 TELEPHONE NO.: 619-767-2023 FAX NO. (Optional): 619-767-2026 E-MAIL ADDRESS (Optional): dgraves@dir.ca.gov ATTORNEY FOR (Name): Plaintiff	Received JAN 03 2018 Fax Filing
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles STREET ADDRESS: 111 N. Hill Street MAILING ADDRESS: CITY AND ZIP CODE: Los Angeles, CA 90012 BRANCH NAME: Stanley Mosk Courthouse	
PLAINTIFF/PETITIONER: Bodega Latina Corporation DEFENDANT/RESPONDENT: Labor Commissioner of the State of California et.	
FACSIMILE TRANSMISSION COVER SHEET	CASE NUMBER: BS162695

TO THE COURT:

D-86

1. **Please file** the following transmitted documents in the order listed below:

Document name	No. of pages
Respondent's Memorandum of Points and Authorities in Opposition to Petitioner's Motion for new Trial	12

CASE #_____
DATE ENTERED _____ TOTAL: $_____
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NO. OF PAGES (including coversheet) Gov.
CONFIRMATION FEE $_____ PROCESSING FEE $_____
ENTERED BY _____, Deputy Clerk

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2. ☐ **Processing instructions** consisting of: _____ pages are also transmitted.

3. ☐ **Fee required** ☐ Filing fee ☐ Fax fee (Cal. Rules of Court, rule 10.815)
   a. ☐ **Credit card payment** I authorize the above fees and any amount imposed by the card issuer or draft purchaser to be charged to the following account:
   ☐ VISA ☐ MASTERCARD Account No.: Expiration date:

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   b. ☐ **Attorney account** (Cal. Rules of Court, rule 2.304). Please charge my account no.:

15:00:49 2018-01-03

EXHIBIT B

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

BODEGA LATINA CORPORATION,

Petitioner,

vs.

LABOR COMMISSIONER OF THE STATE OF CALIFORNIA, DEPARTMENT OF INDUSTRIAL REPLATIONS, DIVISION OF LABOR STANDARDS ENFORCMENT,

Respondent.

CASE NO. BS162695

RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

Hearing Date: September 27, 2017
Time: 9:30 a.m.
Department : 86
Judge: Honorable Amy Hogue

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I. INTRODUCTION

On August 29, 2015, the Division of Labor Standards Enforcement ("DLSE") issued a wage citation to Bodega Latina Corporation for violations of Labor Code section 1197 for failing to pay minimum wage to four employees; for violations of Labor Code section 510 for failing to pay overtime wages to four employees; for violations of Labor Code section 226.7 and section 11 governing meal periods of the Industrial Welfare Commission ("IWC") wage order for failing to provide a 30 minute duty free meal period to three employees; and for violations of Labor Code section 226.7 and section 12 governing rest periods of the IWC wage order for failing to provide a 10 minute duty free rest period to 19 employees. (AR-000001[1])

Bodega Latina timely appealed the citation. The administrative hearing on the citation was held over the course of several days, finishing on February 3, 2016. (AR-000021; AR-000038-000989) On April 8, 2016, the hearing officer issued the Notice of Findings on the citations. (AR- 000020-000037) The hearing officer affirmed the citation as amended at hearing. (*Id.*) On June 13, 2016, Petitioner timely filed this writ challenging the hearing officer's findings.

II. RELEVANT FACTS

On April 18, 2014, the Labor Commissioner's office conducted a multi-store compliance inspection of Bodega Latina' El Super markets. (AR-000055:11-17) Deputy Labor Commissioner Catalina Botello ("DLC Botello") and Industrial Relations Representative Jocelyn Lopez ("IRR Lopez") conducted the inspection at Bodega Latina's Santa Fe Springs location. (AR-000052:18-25)

During the inspection, DLC Botello observed employees personally using the time clock and observed an individual identified as "Madge" clocking other employees in and out. (AR-000054:10-12; 18-20) Madge explained to DLC Botello that she would clock employees in and out for lunch when the employee was past their scheduled time for a lunch break. (AR-000054:21-000055:2) Bodega Latina prohibited DLC Botello and IRR Lopez from interviewing

[1] All references to the Certified Administrative Record prepared by the agency will be noted by the use of the following initials: "AR" followed by the page number. The Reporter's Transcript has been made part of the Administrative Record and will be referenced by the Administrative Record page number.

employees on the day of inspection. (AR -000053:10-000054:5)

DLC Botello spoke with Bodega Latina's attorney, Laura Reatheford, who confirmed that employees' posted schedules included each employee's start time, meal period, rest period and end time, (AR-000056:9-11) and that the time clocks at each facility would not allow employees to clock in more than 7 minutes before their start time or after 7 minutes of their scheduled departure time. (AR-000056:7-9) DLC Botello was also advised that Bodega Latina operated 45 stores and the same labor practices were in effect at all 45 stores. (AR-000055:19-56:1)

Following the inspection, investigators interviewed forty-five Bodega Latina employees. (AR-000057:7-10) Based on the employee interviews, the DLSE determined that certain employees were not permitted timely meal periods, were denied rest breaks and were owed minimum wages and overtime wages for work performed off the clock. (AR-000057:25-000058:4) After the DLSE issued Citation WA102338, Bodega Latina provided a copy of the class action settlement agreement which was executed in November and December 2013. (AR-000058:5-6, 15-25; AR000995-001037) Based on the defined class period ending December 31, 2012, DLC Woo amended the citation to reflect a period of violation from January 1, 2013 to June 6, 2015. (AR-000059:7-000060:16; AR-001039) DLC Woo entered as an exhibit and explained audit spreadsheets (AR-001055-001474) which were based on the information provided by employees and formed the basis of the citation. (AR-000075-000087)

During the administrative hearing, several employees confirmed the information provided during the interviews and which formed the basis of the citation for denied rest breaks [Martinez (AR-000129:10-13; AR-000130:1-4; AR-000153:15-21; AR-000154:8-000155:2; AR-000134:3-11; AR-000160:19-25; AR-000161:13-23; AR-000162:2-23); Yanez (AR-000181:18-000182:14; AR-000187:3-17); Jiminez (AR-000208:4-10; AR-000209:2-17); Garcia (AR-000221:17-000223:1; AR-000222:11-13; AR-000233:25-000234:1; AR-000235:3-5; 9-13); Robles (AR-000317:5-21; AR-000318:9-11); Aguirre (AR-000359:11-17; AR-000373:6-9; AR-000373:13-14; AR-000377:20-23; AR-000378:3-6, 13-15, 20-22; AR-000381:4-17); Valle (AR-000410:10-19; AR-000411:10-11; AR-413:2-4; AR-000424:7-8); Orozco (AR-000445:23-000446:7); De

Porras (AR-000472:9-24; AR-000495:13-19; AR:000497:20-23); Mejia (AR-000550:9-12; AR-000556:25-000557:5; AR-000569:22:25); Olivares (AR-000585:7-19; AR-000585:25-000585:9, AR-000586:17; AR-000588:4-6); Urrutia (AR-000628:15-000629:1; AR-000629:11-13; AR-000630:17-20; AR-000636:12-19); Moran (AR-000661:17-24; AR-000662:18-23)]; missed meal periods [Garcia (AR-000221:17-000223:1; AR-000222:11-13; AR-000233:25-000234:1; AR-000235:3-5; 9-13); Moran (AR-000676:19-23; AR-000677:3-14; AR-000678:14-19)]; and overtime and minimum wages due for uncompensated work [Jorge Martinez (AR:000130:1-4; AR-000131:20-24); Jose Garcia (AR-000218:11-000219:14; AR-000220:4-10; AR-000220:17-19; AR-000257:24-000258:14; AR-000221:17-000223:1; AR-000222:11-13; AR-000233:25-000234:1; AR-000235:3-5; 9-13)]. The hearing officer found that the DLSE's witnesses testified credibly (AR-000031:24-26) and properly concluded that the DLSE met its burden establishing the violations. (AR-000029:7-16; AR-000030:4-11; AR-000030:24-000031:7)

The hearing officer noted that eleven of petitioner's twelve witnesses were currently employed with petitioner at the time of hearing, one regional director, six store directors, one department manager and two clerks. (AR-000027:16-20) These witnesses all claimed that the employees all took their breaks and lunches, had not made complaints that they were denied meal or rest periods or not paid for uncompensated hours and were provided with the employee handbooks governing petitioner's meal and rest period policies. (AR-000027:20-23). The hearing officer determined that petitioner's meal and rest period policies were inconsistently applied and that the witnesses for petitioner lacked credibility with respect to refuting the testimony provided by the DLSE's witnesses. (AR-000031:2-7)

At the hearing, Bodega Latina also argued that with the exception of four employees (two who opted out of the class action (AR-00095:17-21) and two who were not included in the defined class (AR-000099:10-000100:1; 10-196; AR-000102:1-9; AR-000116:12-17), the individuals for whom the DLSE determined were owed wages had released their claims through December 27, 2015 by virtue of the class action settlement. (AR-00069:4-7; AR-000071:3-5; AR-001480-001486). The hearing officer held that the DLSE was not a party to the class action and that no evidence was presented which would preclude the DLSE from proceeding on the

citation. (AR-000028)

III. ARGUMENT

Petitioner asserts that its Petition for Writ of Mandate should be granted because the evidence does not support the findings and because the Labor Commissioner exceeded her jurisdiction, abused her discretion by failing to apply the class action settlement to the citation, and denied petitioner due process by failing to provide petitioner a fair trial. As discussed below, none of the arguments propounded by Petitioner justify issuance of the writ of mandate.

A. STANDARD OF REVIEW

An aggrieved party may seek judicial review of an administrative order or decision by filing a petition for a writ of mandate in the Superior Court. "The inquiry in such a case shall extend to the questions whether the respondent [agency] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." Code Civ. Proc., §1094.5 subd. (b).

The standard of review depends on the nature of the right affected by the administrative decision. *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 217. If the decision of the administrative agency substantially affects a vested, fundamental right, then the trial court exercises its independent judgment upon the evidence. *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143. In cases in which the administrative proceeding does not affect a fundamental vested right, the trial court reviews the administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law. *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144. In such a case "[a] court may reverse an administrative order only if the hearing officer's factual determinations are not supported by the weight of the evidence." *Vison v. Snyder* (1999) 75 Cal.App.4th 182; *Santos v. Dept. of Motor Vehicles* (1992) 5 Cal.App.4th 537, 545.

Generally, the assessment and review of penalties does not vest the reviewing court with the power to exercise independent judgment. "Neither a trial court nor an appellate court is free

to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed." *California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1579. Further, "there is no vested right to conduct a business free of reasonable governmental rules and regulations." *Northern Inyo Hosp. v. Fair Employment Practices Com.* (1974) 38 Cal.App.3d 14, 22. Preservation of economic interests has not been held to affect fundamental vested rights. *Champion Motorcycles Inc. v New Motor Vehicle Board* (1988) 200 Cal.App.3d 819, 824. Where the right addressed is purely economic, the substantial evidence test applies to judicial review. *Kawasaki Motors Corp. v. Superior Court* (2000) 85 Cal. App.4th 200, 203-205.

Courts have addressed the appropriate *trial court* standard of review (independent judgment or substantial evidence) with respect to citation proceedings and have held that the heightened standard of review (independent judgment) does *not* apply. *Owen v. Sands* (2009) 176 Cal.App.4th 985, 992. The *Owens* court, citing a string of cases pertaining to civil penalties for violations of law, explained that where the only sanction imposed is a fine—not revocation, suspension, or restriction of a license—no fundamental vested right is implicated and the trial court is not authorized to exercise independent judgment on the evidence." *Id.* at p. 992.

"[J]udicial review of an agency's assessment of a penalty is limited [to the substantial evidence test] and the agency's determination will not be disturbed in mandamus proceedings unless there is an arbitrary, capricious or patently abusive exercise of discretion by the agency." *Flippin v. Los Angeles City Bd. Of Civil Service Commissioners* (2007) 148 Cal.App.4th 272; *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44. An abuse of discretion is "discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered." *Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667; *Schaub's, Inc. v. Dept. Alc. Bev. Control* (1957) 153 Cal.App.2d 858, 866. The trial court may not disregard or overturn the Commission's finding "for the reason that it is considered that a contrary finding would have been equally or more reasonable." *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94; *Bowman v. Alcoholic Bev. App. Board* (1959) 171 Cal.App.2d 467, 471-472. Moreover, as the court in *Bristol v. Young*

(1943) 23 Cal.2d 221, 223-224 explained: "...when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." Essentially, unless the finding, viewed in the light of the entire record, is so lacking in evidentiary support as to render it unreasonable, it may not be set aside.

B. SUBSTANTIAL EVIDENCE SUPPORTS THE MINIMUM AND OVERTIME WAGE ASSESSMENT

DLC Botello and IRR Lopez interviewed Jose Garcia, Jorge Martinez and Juan Carlos Urutia who indicated that they worked time off the clock which resulted in a minimum wage and overtime assessment. (AR:-000057:7-10; AR-000057:25-000058:4). DLC Woo testified that the audits were prepared based on information obtained from employees. (AR-000308:16-23) Mr. Garcia and Mr. Martinez both testified at the hearing and confirmed that they worked time off the clock, partly because they were not permitted to clock in or out with 7 minutes of their shift and no time adjustments were made for their actual hours worked. (AR:000130:1-4; AR-000131:20-24; AR-000218:11-000219:14; AR-000220:4-10; AR-000220:17-19; AR-000257:24-000258:14; AR-000221:17-000223:1; AR-000222:11-13; AR-000233:25-000234:1; AR-000235:3-5; 9-13)

Socorro Sanchez testified on behalf of Bodega Latina. (AR-000822) Ms. Sanchez supervised Mr. Martinez at an unspecified time and claimed that Mr. Martinez took his breaks. (AR-000826:9-14) However, Ms. Sanchez did not provide any testimony to refute the DLSE's claim that Mr. Martinez was owed minimum and overtime wages for time worked off the clock. Abel Guidino also testified on behalf of Bodega Latina but like Ms. Sanchez, did not provide any testimony to refute the DLSE's claim that Mr. Martinez was owed minimum and overtime wages for time worked off the clock. (AR-000835-000842) Armando Nava testified on behalf of Bodega Latina and stated that he saw Mr. Garcia take breaks but did not provide any testimony to refute the DLSE's claim that Mr. Garcia was owed minimum and overtime wages for time worked off the clock. (AR-000928-000938)

Petitioner contends that the DLSE's calculation for Mr. Garcia's overtime claim is contradicted by Mr. Garcia's own testimony. (Petitioner's Opening Brief at page 10) However,

a thorough reading of Mr. Garcia's testimony suggests this is not quite true. Specifically, the DLSE's audit, based on information Mr. Garcia provided during the investigation, credits him with three uncompensated hours each day. (AR-001178-001218) Mr. Garcia testified that his scheduled shift was 6:00 a.m. to 2:30 p.m. and that he would work from 5:00 a.m. to 3:30 p.m. (AR-000218:13-000219:14) Mr. Garcia also testified that he would not get his full 30 minute duty free meal period. (AR-000221:17-000222:1) Essentially, Mr. Garcia was working at least 10.5 hours and it was not unreasonable for the hearing officer to affirm the citation of 3 hours of overtime rather than 2.5 hours given the information provided to the investigators was provided a year earlier, more recent in time than the testimony given at the hearing a year later.

Labor Code §1197 provides that the payment of a less wage than the minimum so fixed is unlawful. Labor Code §1197.1 provides that an employer who pays a wage less than the minimum fixed by an order of the commission shall be subject to a civil penalty, restitution of wages and liquidated damages. Labor Code §510 provides in relevant part that any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay.

A review of the audits for Jose Garcia, Jorge Martinez and Juan Carlos Urutia, admitted as DLSE Exhibit 4 at AR-001178-001218; AR-1080-1081; and AR-001082-001134, reveals that each is owed minimum wage and overtime wages based on information provided by these three employees to the DLSE investigators.

DLC Woo's testimony that the audits were based on information provided by the employees and employer records with respect to the employee's hours worked and compensation is admissible evidence in the administrative hearing. Hearsay evidence is sufficient to support a finding in administrative proceedings. Government Code §11513(d). Section 11513(d) makes it clear that **an objection is necessary to prevent hearsay from being relied on to support a finding.** Failure to object will allow the hearsay, standing alone, to be considered of probative value and to be the sole support of a finding in administrative proceedings. *Fox v. San Francisco Unified School District* (1952) 111 Cal.App.2d 885, 891. See also *Dibble v. Gourley* (2002) 103 Cal.App.4th 496, *disapproved on other grounds* and *Borror v. Department of Inv.* (1971) 15

Cal.App.3d 531, 546, which both hold that a party must object at the administrative proceeding otherwise hearsay evidence is sufficient.

Second, when an employer has failed to fulfill a statutory obligation to keep accurate time records, testimony by the affected employee is sufficient to establish the amount of hours worked and wages due.

Labor Code Section 1174, subsection (d) provides that every employer shall keep payroll records showing the hours worked daily by, and the wages paid to, employees. In addition, Industrial Welfare Commission ("IWC") Order 7-2001 (Title 8, California Code of Regulations, §11070), which regulates the wages, hours and working conditions in the defendant's business, requires employers to keep accurate time records showing when the employee begins and ends each work period and when meal periods are taken.

Testimony at the hearing confirmed that employees were prevented from clocking in or out of their shift or meal periods unless it was within seven minutes of their schedule. (AR-000056:7-9) Employees such as Mr. Garcia, Mr. Martinez and Mr. Urutia who worked time before or after their scheduled shift would not be able to have that time reflected in their time records unless a manager modified an employee's time record to accurately reflect the time. Mr. Garcia confirmed that his time records were not modified to accurately reflect his actual hours worked. (AR-000220:20-24; AR-000240:21-24; AR-000241:3-8; AR-000244:11-14)

Petitioner violated the record keeping provisions of the Labor Code and IWC Wage Orders by failing to accurately record the employees' time worked before or after their scheduled shift. The information provided to the DLSE investigators regarding time worked off the clock that resulted in the audits, coupled with Mr. Garcia's and Mr. Martinez' testimony as to the hours they worked off the clock and Bodega Latina's time keeping system which prevented them from accurately recording their own hours, are sufficient to meet the burden of establishing the compensable hours for which the employees are owed. Thus substantial evidence exists that the amount of wages due as reflected in the wage audits were properly calculated.

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C. SUBSTANTIAL EVIDENCE SUPPORTS THE MEAL PERIOD ASSESSMENT

DLC Botello and IRR Lopez interviewed Jose Garcia, Juan Carlos Urutia and Herbert Alfredo Moran who indicated that on occasion, they were not able to take a full, thirty minute duty free meal period. (AR:-000057:7-10; AR-000057:25-000058:4). DLC Woo testified that the audits were prepared based on information obtained from employees. (AR-000308:16-23) Mr. Garcia and Mr. Moran both testified at the hearing that they were denied meal periods, were unable to take a full-30 minutes meal period, or received their meal period after the fifth hour of work. (AR-000221:17-000223:1; AR-000222:11-13; AR-000233:25-000234:1; AR-000235:3-5; 9-13; AR-000676:19-23; AR-000677:3-14; AR-000678:14-19)

Armando Nava testified on behalf of Bodega Latina. (AR-000928) Mr. Nava supervised Mr. Garcia at an unspecified time and stated that he saw Mr. Garcia taking his meal breaks on numerous occasions. (AR-000933:11-13) However Mr. Nava did not provide any testimony that he had personal knowledge about what time Mr. Garcia took his meal period or how long Mr. Garcia was able to take a meal period. Essentially, Mr. Nava did not provide any direct evidence to refute the DLSE's claim that Mr. Garcia was not provided a timely and full 30 minute duty free lunch period each day.

Erika Medina, store director testified that she saw Herbert Moran taking breaks. (AR-000850:21-000851:5; AR-000867:14-25) However, Ms. Medina did not provide any testimony to refute the DLSE's claim that Mr. Moran was not provided a timely and full 30 minute duty free lunch period each day. Petitioner contends that Mr. Moran testified that he received his meal breaks late one or two days per week but that the DLSE audit attributes missed meal periods each day he worked. A review of Mr. Moran's testimony reveals a discussion of meal periods and rest periods in different departments, under different managers and during different times. It is certainly not clear from Mr. Moran's testimony when exactly he received complete and timely meal periods and when he did not. Given the imprecise testimony at the hearing regarding these factors, it was not unreasonable for the hearing officer to affirm the assessment as determined by the

DLSE during its earlier investigation.

IWC Wage Order 7, Section 11 sets forth the meal period requirements for petitioners' employees. Section 11 states:

> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

The information provided to the DLSE investigators regarding missed or late meal periods, Mr. Garcia's and Mr. Moran's testimony regarding their missed meal periods and Bodega Latina's failure to refute the evidence, provides substantial evidence that the meal period assessment was properly issued and affirmed.

D. SUBSTANTIAL EVIDENCE SUPPORTS THE REST PERIOD ASSESSMENT AND THE FINDING THAT THE PENALTIES WERE PROPERLY CALCULATED

1. The Rest Period Assessment is Supported by Substantial Evidence

As discussed above, DLC Botello and IRR Lopez interviewed 45 employees after which they determined that certain employees were not permitted to take 10 minute duty free rest periods in accordance with IWC Wage Order 7, section 12 and Labor Code section 226.7 which requires an employer to authorize and permit 10 minute rest periods for every four hours worked or major fraction thereof.

The rest period assessment is further supported by the testimony of thirteen employees. (AR-000127-000688). Bodega Latina's witnesses offered testimony that the employees were able to take their breaks. However the counter-testimony proffered failed to adequately refute the DLSE's witness testimony in that no information was provided as to when the alleged breaks were taken, how often the breaks were observed, that the testifying witness actually knew how long the alleged break lasted, whether the witnesses to the break knew if the other employees took all their breaks or any other

information that would directly contradict the testimony of the employees.

In addition, Erika Medina, store director, testified that it was the department managers' responsibility to ensure that employees were complying with Bodega Latina's meal and rest period policies and that the managers would be subject to discipline for failing to follow through with policies with respect to the employees under their supervision. (AR-000852:1-5, 11, 16-24; AR-000853:18-000854:1; AR-000877:5-7) As such, the hearing officer inferred that the petitioner's managers who testified were biased and not as credible with respect to their testimony regarding rest periods. (AR-000027; AR-000031)

Petitioner contends that testimony from Esther Valle, Juana Villegas De Porras, Jacqueline Urrutia and Herbert Alfredo Alas Moran contradicts and refutes the DLSE's audits for these individuals. Again, a review of these witnesses' testimonies reveals a discussion of meal periods and rest periods in different departments, under different managers and during different times. It is certainly not clear from the testimony when exactly each received the rest periods to which they were entitled. Witnesses testified that they would get breaks a few times of week but their testimony did not confirm that they received *both* their morning *and* afternoon break. The hearing officer justifiably inferred from the evidence that even if one rest period was provided, the second was not and that the assessment, as amended, was correct.

2. The Rest Period Penalties were Properly Calculated

The civil penalty portion of WA102338 was assessed for any pay period an employee did not receive a rest period occurring between June 29, 2014 and June 29, 2015 (AR-000073:12-21; AR-001039). Although the audit reveals 19 employees who suffered rest period violations, DLC Woo testified that the penalty assessed was based on three employees, 52 violations each for Dena Maureen Quinn Taylor, Luis Aguirre and Guspar Olivares Pompe (AR-000072:4-000073:1; AR-000073:9; AR-000073:10) For **each pay period** between June 29, 2014 and June 29, 2015, for which an employee is owed rest period premiums counts as one violation. The actual number of violations as reflected in the audits, which are part of the administrative record

are as follows:

Employee	Audit Location in AR	# of pay periods denied rest period between 06/29/14 – 06/29/15
Dena Maureen Quinn Taylor	AR-001474	48
Luis Aguirre	AR-001230	48
Guspar Olivares Pompe	AR-001340	48
Jose Garcia	AR-001213-001218	10
Total # of violations:		154

Substantial evidence supports an assessment of penalties for violation of the rest period provisions on 154 different pay periods, thus an assessment of 152 violations is proper.

E. THE HEARING OFFICER IS ENTITLED TO ASSESS CREDIBILITY AND DRAW INFERENCES TO DETERMINE IF THE DLSE MET ITS BURDEN

"A strong presumption supports the correctness of the findings of the administrative agency. [citations omitted]. The burden of proof rests upon the petitioner for writ of mandate to make a showing sufficient to establish administrative error. [citations omitted] Where the petitioner's assertions of irregular procedure or insufficiency of evidence have been denied, presumptions arise that the administrative proceedings were, in fact, regular and supported by the evidence. [citations omitted] In an administrative proceeding the determination of the credibility of witnesses is within the province of the Board. *Campbell v. Bd. of Dental Examiners* (1971) 17 Cal. App. 3d 872, 875–76.

California Evidence Code section 115 defines "burden of proof" as the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. In the administrative hearings, the trier of fact is the Hearing Officer. Evidence Code §115 also provides "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." Preponderance of the evidence means that the evidence on one side outweighs the evidence on the other side. *People v. Miller* (1916) 171 Cal. 649, 652. It does not have to be "clear and convincing" evidence.

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In addition, the hearing officer may make inferences, assess credibility and weigh the evidence. *Beck Development Co. v. Southern Pacific Transp. Co.* (1996) 44 Cal.App.4th 1160, 1204. See also *Hicks v. Reis* (1943) 21 Cal.2d 654, 659 [The trier of fact can consider the interest, bias and motive of the witness in drawing inferences and accepting or rejecting proffered evidence.] An inference is a reasonable conclusion from the evidence. *Krause v. Apdaca* (1960) 186 Cal.App.2d 413, 418. "Even "slight evidence" in support of the fact to be inferred has been held to be sufficient." *Fashion 21 v. Coal. for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal. App. 4th 1138, 1150.

Finally, "an administrative hearing officer's proposed decision is entitled to great weight *because of* his [or her] *opportunity to observe the witnesses and weigh their testimony in light of their demeanor.*" *Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d, 184, 190. "Credibility determinations require a personal presence that a cold transcript cannot convey." *Abbott v. Mandiola* (1999) 70 Cal.App.4th 676, 683.

In this case, the preponderance of the evidence support the wage and penalty assessment in the mind of the trier of fact – the hearing officer - as indicated in her decision. The evidence presented established that the wage audits prepared by the DLSE were properly conducted based on information obtained from employees and payroll records from the employer. The hearing officer reasonably concluded that the audits were valid and that the DLSE had met its burden that, more likely than not, the petitioner violated the Labor Code provisions for which they were cited. After listening to testimony and considering bias and motivations of Bodega Latina's witnesses, she properly determined that Bodega Latina did not establish credible proof disputing the evidence presented by the DLSE.

Petitioner asserts that the hearing officer ignored evidence that petitioner did not prevent them from taking rest breaks and ignored credible evidence of petitioner's witnesses. This is simply not true. The hearing officer noted that petitioner had implemented policies regarding meal and rest periods but found that the Division's witnesses testified credibly that petitioner's managers made if difficult, if not impossible for the employees to take both their rest periods. (AR-000031) The hearing officer found a culture within the stores which essentially prevented

employees from taking their rest periods despite petitioner's policy. The hearing officer determined that petitioner's inconsistent implementation of its policies and lack of credible testimony failed to refute the audit findings. (AR-000031:2-7) Clearly, the hearing officer considered the evidence as indicated in her decision but then gave it the weight that she considered that evidence deserved. In effect, Bodega Latina is requesting that the reviewing court reweigh the evidence and credibility of witnesses, which the court is not empowered to do. *City of Los Angeles v. Civil Service Commission* (1995) 39 Cal. App. 4th 620, 633.

F. THE LABOR COMMISSIONER DID NOT DEPRIVE PETITIONER OF A FAIR HEARING OR INFRINGE UPON PETITIONER'S DUE PROCESS RIGHTS

1. The Labor Commissioner Afforded Petitioner a Fair Trial

Due process requires notice and an opportunity to be heard, including the right to present and rebut evidence, in actions in which the agency determines the facts and law and applies them to a particular person. Government Code §11425.10(a)(1).

The Labor Code affords employers extensive due process to challenge civil penalties, including written notice and opportunity for a hearing. For example, a citation for failure to pay minimum wage provides that a person who wishes to contest a citation can request an informal hearing after which a decision shall be rendered and served on all parties. A party wishing to then challenge the decision may file a writ of mandate for judicial review. (See Labor Code §1197.1) Wage citations for overtime wages, meal period premiums and rest period premiums are issued pursuant to Labor Code §558. Labor Code §558 utilizes the procedures for contesting a citation or penalty assessment set forth in §1197.1

During the hearings, Petitioner had every opportunity to present testimony and evidence and in fact did so. (See AR-000716-000940 – testimony of witnesses and AR-001480-001862 - exhibits). Petitioner cross-examined all witnesses called by the Division. (See AR-000127-000688) Petitioner had the right to call its own witnesses, including any employees not called by the DLSE for whom the audit was performed that gave rise to the citation. (See Government Code §11450.10) The DLSE was not required to produce every employee for whom it based its audit and citation. As indicated below, hearsay evidence is admissible in administrative hearings

and petitioner was not denied due process on the grounds certain individuals did not testify and thus were not available for cross-examination. Petitioner was afforded due process under the Administrative Procedure Act and was not denied a fair trial.

2. The Citation Hearing Process is not Subject To Discovery

Petitioner objects to the findings and asserts that the hearing was fundamentally unfair because it was denied its request for records upon which the audit was based and the citation was issued. Petitioner's objections are unfounded.

The DLSE's citation appeal hearings are governed by the informal hearing procedures of the Administrative Procedures Act ("APA") set forth in Government Code §11400, et seq. Under the informal hearing procedures of the APA, there is no due process right to prehearing discovery. See also *Mohilef v. Janavici* (1996) 51 Cal.App.4th 267 (due process of law does not guarantee a prehearing right to discovery) and *Cimarusti v. Superior Court* (2000) 79 Cal.App.4th 799, 809 (The scope of discovery in administrative hearings is governed by statue and the agency's discretion.)

The decision by the hearing officer was based upon the evidence presented at the hearing to which the petitioner had an opportunity to review, object to and refute. The DLSE was not obligated to respond to any requests for records provided that any documents presented at the hearing were made available to petitioner at the hearing as well.

3 The Labor Commissioner was not Required to Eliminate Claims of Non-Testifying Employees' Audit Amounts from the Citation and did not Commit Prejudicial Error by Keeping Those Amounts in the Assessment

Petitioner claims they were denied the right to confront "absentee employees" as a witness. This is simply not true because these employees did not testify at the hearing as a witness and the DLSE did not prevent petitioner from calling any witness to testify. Although DLC Woo testified that the audits were performed based on information provided by employees during investigative interviews, petitioner could have objected at the hearing that DLC Woo's testimony regarding the audits was based on hearsay. Petitioner waived the hearsay objection by failing to timely assert it at the hearing. [Failure to object will allow the hearsay, standing alone, to be considered of probative value and to be the sole support of a finding in administrative

proceedings. *Fox v. San Francisco Unified School District* (1952) 111 Cal.App.2d 885, 891; Government Code §11513(d).]

Petitioner argues that non-testifying employees should have been excluded from the audit and the final decision and order because they were not individually present to "prove their claim." Petitioner relies on the statute and DLSE's policies and procedures pertaining to the *Berman* wage claim proceedings to support this contention. However, BOFE citation appeal hearings are not wage adjudication hearings and are not governed by the same statutes and procedures.

a. The Wage Adjudication Process Within the Division of Labor Standards Enforcement

If an employer fails to pay an employee his or her wages in the amount, time or manner required by contract or statute, the employee has two options. The employee may seek judicial relief by filing a civil action against the employer or the employee may seek administrative relief by filing a wage claim with the labor commissioner pursuant to a special statutory scheme codified in Labor Code sections 98 to 98.8. *Cuadra v. Millan* (1998) 17 Cal.4th 855, 858. The latter option is commonly known as the "Berman" hearing procedure after the name of its sponsor. *Id.* The Berman hearing procedure is designed to provide wage earners a speedy, informal and affordable method of resolving their **individual** wage claims and to avoid recourse to costly and time-consuming judicial proceedings. *Cuadra, v. Millan* 17 Cal.4th at 858 and 869 (emphasis added).

b. The Citation Appeal Hearing Process within the Division of Labor Standards Enforcement

Labor Code section 90.5, establishes a Bureau of Field Enforcement (BOFE unit) under the jurisdiction of the Labor Commissioner which is administratively and physically separate from the (wage adjudication unit) offices that accept and determine individual employee complaints. The BOFE unit has the primary responsibility for administering and enforcing those statutes and regulations most effectively enforced through field investigations. Labor Code section 1197.1 provides that upon inspection or investigation (by the BOFE unit), if the Labor Commissioner determines that a person has been paid a wage less than a minimum, the Labor

Commissioner may issue a citation to the person in violation. An employer wishing to contest the citation may file an appeal by request for an *informal* hearing, Labor Code §1197(c)(1). The Labor Commissioner shall hold a hearing after which the citation shall be affirmed, modified or dismissed. *Id.*

The wage adjudication process outlined in Labor Code §98 upon which petitioner relies, is not applicable to citation hearings. As such, the Labor Commissioner can affirm an assessment for non-testifying employees.

4 The Statutory Time Lines for Issuing and Serving Decisions are Directory, not Mandatory or Jurisdictional.

When a party wishes to contest a citation or proposed assessment, the party must notify the Labor Commissioner in writing. (See Labor Code §1197.1(c)(1) The Labor Commissioner shall thereafter hold a hearing and serve the decision on the parties. "The Labor Commissioner ... shall, within 30 days, hold a hearing.... The decision... shall be served on all parties to the hearing within 15 days after the hearing..." Labor Code §1197(c)(1)[2].

Petitioner latches on to the word "shall" and argues that the Labor Commissioner lost its authority to render a decision on the appeal hearing because the findings were not served within 15 days of the hearing. However, contrary to petitioner's assertions, the word "shall" as used in the Labor Code sections at issue are directory, rather than mandatory or jurisdictional and the failure to issue the findings within 15 days does not deprive the Labor Commissioner of jurisdiction to render the decision.

The California Supreme Court has held that requirements relating to time within which an act must be done by divisions of the State's Executive Branch of government are directory, rather than mandatory or jurisdictional:

> We have held that, generally, requirements relating to the time in which an act must be done are directory rather than mandatory or jurisdictional, unless a contrary intent is expressed.... In some cases focus has been directed at the likely consequences of holding a

[2] The procedures for issuing and contesting citations for overtime wages, meal period premiums and rest period premiums are the same as those set out in Labor Code §1197.1 Labor Code §558(b)

> particular time limitation mandatory, in an attempt to ascertain whether those consequences would defeat or promote the purpose of enactment. Other cases have suggested that a time limitation is deemed merely directory, 'unless a consequence or penalty is provided for failure to do the act within the time commanded.'

Edwards v. *Steele* (1979) 25 Cal.3d 406, 410, citing *Morris v. County of Marin* (1977) 18 Cal.3d 901, 908 (*disapp'd on other grounds),* citations omitted.

In ascertaining probable intent of whether time limits are to be construed as mandatory, California courts have expressed a variety of tests:

> In some cases focus has been directed at the likely consequences of holding a particular time limitation mandatory . . . to ascertain whether those consequences would defeat or promote the purpose of the enactment. Other cases have suggested that a time limitation is deemed merely directory 'unless a consequence or penalty is provided for failure to do the act within the time commanded.'

Woods v. California Department of Motor Vehicles (1989) 211 Cal.App.3d 1263, 1267, citations omitted.

In this case, the application of either test yields the same result. First, nowhere in Labor Code sections 1197.1 or 558 does there appear a consequence or penalty for noncompliance by the administrative agency with the provisions relating to time within which the decision must be rendered and served. Neither statute holds that failure to serve the decision within the 15 days renders the decision void or deprives the Labor Commissioner of jurisdiction to hear the matter. Nor does a delay prejudice the employer.

Second, holding the time limits mandatory would defeat the purposes of the statutes' enactment if the time limitations were not met. The Labor Code provides, "It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards." Labor Code §90.5(a). Labor Code §90.5

goes on to state that in order to ensure that minimum labor standards are adequately enforced, the Labor Commissioner shall administer and enforce those statutes most effectively enforced through filed investigations. Labor Code §90.5(b). Labor Code §96.7 provides that the Labor Commissioner after investigation and upon determination that wages are due, may collect such wages or benefits on behalf of the worker. Clearly, the legislative intent of the penalty and wage provisions for violating Labor Code sections 1197, 510, 226.7 and other provision of the IWC Wage Orders is to ensure compliance with the Labor Code, provide protections to workers and compliant businesses and to collect unpaid wages on behalf of workers. To find the time provisions set forth therein to be mandatory would only serve to permit a non-compliant employer to sidestep the legal consequences of their violations of the fundamental public policies of this state based on a mere procedural deficiency.

G. THE DLSE DID NOT ERROR IN REFUSING TO APPLY THE CLASS ACTION SETTLEMENT TO THE CITATION AT ISSUE

Petitioner argues the doctrine of res judicata precludes the DLSE from issuing and affirming the citation at issue because the violations for which the citation was issued were settled in *Cardoza v. Bodega Latina* class action case.

1. The DLSE is not Subject to the Class Action Settlement

The settlement agreement entered as an exhibit at the administrative hearing is between the named plaintiffs, Rafaela Rivera and Delma Cordoza, the class members they represent, and Bodega Latina Corporation dba El Super. (AR-000998) The DLSE is not a party to the settlement agreement.

In addition, the settlement agreement specifically defines the class as individuals who worked between 2005 and December 2012 and the class period is defined as July 25, 2005 to December 31, 2012, (AR-000998-000999) The initial complaint was filed July 27, 2009 seeking damages and restitution for violations of Labor Code sections 201 (payment of wages at time of discharge), 202 (payment of wages at time of quitting), 203 (penalty for failing to pay all wages due at time of discharge or quitting), 226 (itemized wage statements), 226.7 (provision of meal and rest periods), 1174 (record keeping), 1174.5 (penalty for violation of record keeping

requirements), 2802 (indemnification for business expenses) and Business & Professions Code section 17200 (unfair business practices). (AR-001003, §2.8)

The parties reached the basic terms of the settlement on May 25, 2011. (AR-001003) BOFE did not commence its investigation until April 2014, nearly 3 years after the parties in the *Cardoza* matter reached its settlement. (AR-000055:11-17)

Labor Code §90.5 states, "It is the public policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards."

Moreover, the citation issued to Bodega Latina is an enforcement action, seeking to vindicate the public interest as expressed in Labor Code §90. Although not in the same context as this matter, the effect of a private agreement on the enforcement powers of the EEOC, an administrative agency charged with vindicating certain employee rights, was discussed by the U.S. Supreme Court in *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279. In *Waffle House*, the Court held that an arbitration agreement between an employer and employee could not preclude the EEOC from seeking injunctive and monetary relief on behalf of that employee. *Id.* at 295-98. The Supreme Court in *Waffle House* noted that the EEOC stands not just in the shoes of the individual, but as an enforcement vehicle for the public interest. Separate, private agreements to which the EEOC is not a party do not necessarily vitiate the EEOC's authority to proceed in furtherance of the public interest. *Id.* at 296.

In this case, the *Cardoza* settlement should not preclude the DLSE from investigating claims and assessing wage and penalties for violations occurring between January 1, 2013 and June 2015. Specifically, the *Cardoza* action was filed in 2009 for claims going back to 2005. The *Cardoza* parties entered into a preliminary settlement agreement in May 2011 and a formal settlement agreement in 2013, which was not formally approved until 2015. The DLSE sought to recover for violations which occurred outside the class period and after the parties agreed to

settlement. The fact that the parties in the *Cardoza* action took **four** years to finalize their settlement agreement and have it approved does not and should not preclude the DLSE, and specifically the BOFE unit, from carrying out its statutory mandated duties of investigating and ascertaining violations of the Labor Code by petitioner that occurred *after* the *Cardoza* case was filed and settled.

2. Res Judicata and Collateral Estoppel Do Not Apply to the DLSE

The doctrine of res judicata describes the preclusive effect of a final judgment on the merits. *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1326. The doctrine has two aspects: the first is claim preclusion, otherwise known as res judicata, which prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. *Id.* The second is issue preclusion, or collateral estoppel, which precludes relitigation of issues argued and decided in prior proceedings. *Id.*

The doctrine of res judicata is applicable if three threshold requirements are satisfied: 1) the decision in the prior proceeding is final and on the merits; 2) the parties must be the same as, or in privity with the party to the former proceeding; and 3) the present proceeding is on the same cause of action as the prior proceeding. *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2004) 126 Cal.App.4th 1180. . However, where the subsequent action involves parallel facts, but a different historical transaction, the application of the law to the facts is not subject to res judicata or collateral estoppel. *Chern v Bank of America* (1976) 15 Cal.3d 866, 871.

As indicated above, the *Cardoza* case was filed in 2005, seeking recovery for violations of law occurring from 2005 through the date of filing the litigation, and arguably to the date the parties agreed to settle. The parties in *Cardoza* reached preliminary settlement in May 2011. The settlement specifically excludes employees who were not working at Bodega Latina after December 2012, (AR-000998 §1.5) and thus by inference, does not compensate employees for violations occurring thereafter. Although the final settlement documents were not signed until 2013 and were not approved by the court until 2015, the violations for which the DLSE issued its

citations were for those occurring after 2012. Although the "causes of action" may be the same as those litigated in *Cardoza*, they are clearly not identical in that they involve completely different time periods than those contemplated when the *Cardoza* action was filed four years earlier.

Petitioner argues that the DLSE is in privity with the *Cardoza* plaintiffs because the DLSE delegated its authority to recover wages and penalties to the *Cardoza* plaintiffs through the PAGA statute. Res judicata is an affirmative defense which must be pleaded and proved in the underlying administrative or trial court action. *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 89. Although the settlement agreement generally refers to "PAGA" claims (AR-001001 §1.19; AR-001005 §4.2) and the Court Order approving the settlement refers to a payment for PAGA penalties (AR-001484), there is absolutely no mention or evidence of when or if the Labor and Workforce Development Agency ("LWDA") was properly as notified as required by Labor Code section 2699.3. And, if the LWDA was notified, there is no evidence in the record of when LWDA was purportedly notified, what claims were in the notice to the LWDA, or the time period of the alleged violations which were noticed. Petitioner failed to establish that notice was provided, that the PAGA claims alleged in the complaint and alleged to have been settled are the same as those for which the DLSE cited.

Petitioner cites *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562 for its argument that the DLSE is precluded from recovering wages on behalf of individuals who are class members in the *Cordoza* class action. In *Villacres,* the court held that the plaintiff was precluded from bringing PAGA claims that were the subject of a prior class action in which the plaintiff was a class member. The *Villacres* case involved an individual who the court determined was in privity with the prior class action plaintiffs because he was in fact a class member of that class action. That is simply not the case here. The State of California is an enforcement agency charged with enforcing the provisions of the Labor Code and upholding the public policy of maintaining minimum wage standards by assessing and collecting wages.

Even if petitioner's argument of privity based on delegation of authority through PAGA is viable argument, to do so under the parameters argued by petitioner and under the

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circumstances of this case would be unjust and violate the public policy of California.

The determination whether a party is in privity with another is a policy decision which depends on the circumstances of the case and the relationship between the parties. *Gikas v. Zolin* (1993) 6 Cal.4th 841, 849; *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1070. The rule of collateral estoppel and res judicata do not foreclose the relitigation of an issue of law covering a public agency's ongoing obligation to administer a statute enacted for the public benefit and affecting members of the public not before the court. *California v. Optometric Association v Lackner* (1976) 60 Cal.App.3d 500, 505. See also *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 181 recognizing that res judicata will not apply if injustice would result or if the public interest requires that relitigation not be foreclosed; *Louis Stores, Inc. v. Dept. of Alcoholic Beverage Control* (1962) 57 Cal.2d 749 recognizing sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest. The court in *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562 also recognized that public policy could preclude the application of res judicata but held that application of res judicata to Villacres's lawsuit would not result in any manifest injustice to him or any adverse impact upon the public. *Id.* at 592.

The California Supreme Court has repeatedly recognized California's public policy to broadly construe protective statutes regulating the workplace in favor of employee with an eye to promoting the worker protections. See *Smith v. Superior Court* (2006) 39 Cal.4th 77; *Prachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal.4th 217, 228. And, as articulated above, the public policy of this state is to vigorously enforce minimum labor standards and in order to ensure that the minimum labor standards are adequately enforced, the Labor Commissioner shall after investigation and upon determination that wages are due, collect such wages or benefits on behalf of the worker. Labor Code §§90.5(b), §96.7.

Here, public policy precludes the application of res judicata because it would result in a manifest injustice and have an adverse impact on the public interest in the enforcement policies of this state. Specifically, if a PAGA notice was in fact sent to the LWDA, it was required to be done in 2009, before the filing of the *Cardoza* lawsuit for violations occurring prior to 2009.

The *Cardoza* lawsuit reached preliminary settlement in May 2011. (AR-001003 §2.8). The class period covers July 25, 2005 through December 2012. The final settlement agreement was signed in 2013 and approved in 2015, **four years** after which initial settlement was reached. Precluding the DLSE from investigating claims and issuing citations for violations that occurred years after any PAGA notice may have been sent, years after the operative complaint was filed, and for years subsequent to the settlement of the *Cardoza* claims would be unjust, would undermine the purposes for which the DLSE exists and would violate the public policy of this state to determine and assess employers for violations of the Labor Code.

IV. CONCLUSION

Substantial evidence supports the wage audit and wage assessments, as modified. Petitioner was provided a fair hearing and was not deprived of due process. The hearing officer assessed witness credibility and drew reasonable inferences from the evidence in affirming the citation. Finally, neither the rendering the decision more than 15 days after the hearing or res judicata deprived the Labor Commissioner of jurisdiction to investigate and assess for the Labor Code violations for which petitioner was cited.

For the reasons stated herein, Respondent respectfully requests that the writ of mandate be denied.

Dated: August 14, 2017

Respectfully submitted,

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